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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 63.

THE HODGE DRIVE-IT-YOURSELF COMPANY, ET AL.,
Appellants,

vs.

THE CITY OF CINCINNATI, ET AL.,
Appellees.

BRIEF ON BEHALF OF APPELLANTS.

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BRIEF ON BEHALF OF APPELLANTS.

STATEMENT OF THE CASE.

This action originated in the Court of Common Pleas, of Hamilton county, Ohio, in which court the parties

stood in the same relation as they appear in this court, the appellants being plaintiffs and the appellees being defendants.

The appellants who were originally four in number, but who are now but three in number (see summons and severance, R. 4) filed their joint petition setting forth that they are all engaged in the business of renting or leasing automobiles to be operated by the person renting the car, said business being commonly known as the "driverless or drive-it-yourself automobile" business, under contracts entered into between them and the persons renting or leasing their automobiles.

The petition alleged, and the testimony proved the number of automobiles owned by each of them, the nature of their business, the number of years that each of them have been engaged in that business, and further showing that each of them had paid to the state of Ohio, a license fee of not less than four dollars ($4.00) for each automobile owned by them and used in their business, as required by the state law for the right to operate their automobiles in the state of Ohio.

They further alleged that by virtue of an ordinance passed by the city of Cincinnati on February 6, 1929 (effective March 6, 1929) the director of public utilities of the city of Cincinnati, in whom was vested the power by the ordinance, would not issue licenses to them unless they complied with the ordinance by paying certain license fees therein set forth, and unless they procured and deposited with the city treasurer, public liability and property damage insurance policies to protect per-

sons or property that might be injured or damaged as the result of the negligent operation of any of their automobiles by the persons to whom they might rent or lease the same.

They further alleged that it was impossible for them and others similarly situated and engaged in the same line of business, to comply with said ordinance insofar as the insurance policies or bond provisions thereof were concerned, for the reason that no reputable insurance company in good standing, acceptable to the city treasurer, would issue insurance policies for liability and property damage under the terms of said ordinance, and that even if such insurance could be obtained that the premiums for same would be so prohibitive as to result in a complete ruination of their business, with the resulting loss to them of their property and the good will in connection with their business; and that the same was true to even a greater degree with reference to the bond that was required by the ordinance in lieu of such insurance policies, as no bonding company would underwrite such bonds and certainly no private surety could be obtained under the circumstances.

They further alleged that the provisions of said ordinance with reference to the insurance policies or the bond in lieu thereof, were impracticable, unworkable and a vain thing, as it could not be complied with in any event, and that even if it could be complied with, it would in effect result in the creation of a liability on the part of appellants without fault on their part, from which they were exempt under the common law, in that

the payment of the insurance premiums, if insurance could be obtained, would equal if not exceed the possible liability that they might incur if the ordinance attempted directly to make them liable for the negligence of the persons to whom they might lease their automobiles.

They further alleged that their business is not such as is impressed with a public interest, within the meaning of the decided cases interpreting that term; nor that their vehicles are public vehicles as they are defined in the ordinance; that they are not engaged in the business of public or common carriers, and that therefore the city council exceeded its power in enacting said ordinance. They further alleged and claimed that said ordinance and the respective sections thereof complained of, were unconstitutional and void, being in violation and in contravention of the Fourteenth Amendment to the Constitution of the United States, and certain provisions of the Ohio Constitution.

The prayer of the petition was that appellees, the city of Cincinnati and its various officials, should be enjoined from enforcing said ordinance, from interfering with said business and with the operation of their automobiles by persons renting or leasing the same, that the ordinance and the respective sections thereof be declared to be unconstitutional, invalid and void, that a temporary injunction be granted pending the final determination of the cause, and that on final hearing said injunction should be made permanent. (See petition, R., 26-36.)

To said petition appellees filed an answer admitting

practically all of the allegations pleaded by appellants, but denying that it was impossible for appellants to comply with the insurance or bond provisions of the ordinance, and denying that the ordinance and the respective provisions thereof complained of, were unconstitutional, invalid and void, and prayed for a dismissal of appellants' petition. (See answer, R., 36-39.)

The ordinance in question, so far as the pertinent sections thereof were involved in this action, were set forth in the petition (see R., 27-32) and were offered in evidence at the trial (R., 97-103).

Upon the filing of the suit, a temporary restraining order was issued by the Common Pleas Court as prayed for in plaintiffs' petition on the execution of a bond of $1,000.00. Subsequently, the case came on for final hearing on the evidence, was submitted to the court, and after full and careful consideration, the court (Struble, J.) found upon the issues joined in favor of the plaintiffs, declared the various sections of said ordinance complained of to be unconstitutional, void and inoperative as to appellants, and a decree was entered accordingly, permanently enjoining and restraining appellees from interfering with the operation of plaintiffs' business and with the automobiles owned by them and operated by the persons to whom they are rented and leased; and further enjoining said appellees from instituting criminal proceedings against appellants or their agents or against the persons who might rent or lease appellants' automobiles. (See R., 24-25.)

An appeal from said decision was taken by appellees

to the Court of Appeals of the district (an intermediary court) where the case was tried de novo. The matter was submitted to that court, and after consideration that court found in favor of appellees and held said ordinance to be constitutional and valid and entered a decree dissolving the injunction granted by the court below and dismissing appellants' petition. (R., 40.)

Error proceedings were then prosecuted in the Supreme Court of Ohio (the court of last resort), where a petition in error was filed as a matter of right under the Ohio Constitution. After consideration that court affirmed the judgment of the Court of Appeals and likewise held said ordinance to be constitutional and valid. (R., 9.) Application for re-hearing was filed in that court and denied. (R., 9.)

In the appendix to this brief, there is included the opinion of Judge Struble of the Common Pleas Court (P., 44). The opinion of the Court of Appeals is reported in 38 Oh. App. 29; Vol. IV, No. 7, Ohio Bar, May 12, 1931, The opinion of the Supreme Court of Ohio in this case is reported in 123 O. S., 100; 175 N. E., 196, and appears at R., 11-21.

SUMMARY OF THE EVIDENCE.

On behalf of appellants, several witnesses testified including William H. Hodge, the owner of The Hodge Drive-It-Yourself Company, and William Barrs, Jr., the owner of Barrs Self-Driver Company, Inc.

William H. Hodge testified that his company is an

Ohio corporation, with a capital stock of twenty-five thousand dollars ($25,000.00) of which one-half has been paid up in cash; that it owns twenty-two outomobiles which it leases or rents to persons to be driven by them; that the average length of time that the automobiles are used are eight or nine months, when they are traded in for new automobiles, so that no old or badly used cars are maintained. That his company has paid to the state of Ohio for automobile licenses sums varying from four dollars ($4.00) to six dollars ($6.00) per car depending upon the number of cylinders. That his company had been in business for four years; that up to March 1, 1929, he had paid a license fee of eight dollars ($8.00) per car; and that on March 1, 1929, he made application for a license, which the director of public utilities of the city refused to issue unless he procured and deposited with the city treasurer insurance policies for public liability and property damage as required by the ordinance.

He further testified as to the method of doing business; as to the form of application blank which each customer must fill out, a copy of which was offered in evidence; and the inquiries they make as to the financial responsibility of the applicant, as well as to his ability to drive, which must be satisfactory to his company before they rent out a car. That a deposit of ten dollars ($10.00) on a small car, and twenty dollars ($20.00) on larger cars is required, and that the type of people that rent the cars are mostly car owners, truck drivers, cab drivers, people who have worked in one place of employment for a year or

more but who cannot afford to buy an automobile, including lawyers, doctors, and traveling salesmen, and that about one-third of the persons who rent their cars are car owners.

He further testified that since his company had been in business they have had no law suits filed against them, have never had any serious personal injury claims presented, the claims asserted being minor ones, namely, for bent fenders or other slight damage.

That the basic rate of two hundred and thirty-two dollars and fifty cents ($232.50) per car for insurance premiums required would tend to destroy their business in face of the keen competition they have in Cincinnati with the taxi-cab and traction interests.

The witness further testified he made application with a number of insurance companies to obtain such insurance as required by the ordinance, but that he could not obtain it. (R., 58-69.)

William E. Barrs, Jr., testified that his company is an Ohio corporation, with a capital stock of ten thousand dollars ($10,000.00) all of which has been paid in, and that he had been in the business of renting or leasing automobiles to be driven by the person leasing same for over five years; that his method of doing business is very much like that explained by Mr. Hodge, the details of which are in evidence, and copies of the application blank and contract of his company were offered in evidence and were very similar to those used by Durken Drive-It-Yourself Company, Inc.

He further testified that about fifty per cent (50%) of

the renters of his automobiles are car owners. That the average gross yield per car per year is sixteen hundred dollars ($1600.00); that he has tried to get insurance to comply with the ordinance in question from a number of insurance companies, but was turned down. That a small insurance company with a limited captal stock, to wit, the Mercer Insurance Company, of Celina, Ohio, had signified its willingness to underwrite such insurance at a rate of ten per cent (10%) of the earnings of each automobile per year, with a basic rate of two hundred and thirty-two dollars and fifty cents ($232.50) per car. (R., 70-76.)

The Durken Drive-It-Yourself Company, Inc., according to a stipulation entered into between counsel for both sides, would have testified that it operates twenty-one automobiles, and had been in that type of business for some time. A copy of its application blank and contract were offered in evidence as exhibits in the case. (R., 77; 107-8.)

The Brady Driverless and Taxicab Company, according to a stipulation entered into between counsel, would have testified that it is a partnership and that it operates five automobiles which they rent out on the drive-it-yourself plan. (R., 77.)

Harry H. Buxton testified that he was manager of the Bohannon Rent-A-Car Company, with offices in Cincinnati, Ohio, and St. Louis, Missouri, and that for two years his company had carried liability insurance. That the rate formerly was six mills per mile but since the ordinance was passed the rate was increased to nine

mills per mile. That his company had policies of insurance with the Utility and Indemnity Exchange of Kansas City, Missouri, and which policy, at the time of the hearing, was still in force, and that his company had complied with the requirements of the ordinance. (R., 77-80..) However, that policy was cancelled on August 19, 1929. (R., 108-109.)

Thomas R. Bohannon testified that he was the owner of the business operated under the name of Bohannon Rent-A-Car Company, with one place of business in Cincinnati, Ohio, and two places of business in St. Louis, Missouri. That he had been in the driverless or rent-a-car business since 1922, and had been in business for himself since 1926. That in March of 1929, he procured insurance as required by the ordinance with the Utility and Indemnity Exchanges of St. Louis, but that on August 20, 1929, that company cancelled the policy for the reason given that it would not write any more of that type of insurance. He further testified that he had made application with a number of other insurance companies, among them being the American Insurance Company of St. Louis, the General Casualty Company of Detroit, the Lytton Brownell Company of St. Louis, and the Hartford Insurance Company of Connecticut, but that he was unable to obtain insurance from any of them. That the Hartford Insurance Company informed him that they were writing insurance only for the Saunders System, for one year, as an experiment, and that they did not know whether they would care to write any more insurance or not after that and therefore would not take on

any more at that time. That at the time he testified he had no insurance as he was unable to procure any. (R., 92-96.)

John P. Ryan testified that he was the manager of the bonding department of the Cincinnati office of The Aetna Casualty and Surety Company of Hartford, Connecticut; that appellants had made application with his company for a bond as required by the ordinance in lieu of insurance policy; that he turned down their applications for the reason that his company would not underwrite such a bond; and he further testified that no other bonding company of standing would write such a bond as required by the ordinance unless full collateral security or insurance policies as required by the ordinance were deposited with the bonding company to indemnify it against loss. (R., 69-70.)

Karl F. Gerlach testified that he was associated with the firm of Perkins and Geoghegan, representing the Aetna Casualty and Surety Company, of Hartford, Connecticut; that he was asked to write this type of insurance under the ordinance, but that his company refused to write any of it. That he made inquiry of the General Casualty Company of Detroit, which company also turned down this type of insurance claiming that they had plenty of it and did not care to write any more. (R., 55-58.)

J. C. Welch testified that he was manager of the automobile insurance department of Albert W. Schell & Company, representing the Hartford Accident Indemnity Company. That he made inquiry of his company as to

writing insurance for the driverless automobile companies, under the provisions of the ordinance, but that his company would not write the insurance. He further testified that while the hazard of that type of automobile business is no greater than the ordinary private car owner insurance, the risk to the insurance company is greater, because out of town persons rent the cars, meet with an accident, and do not report it, and that if the insurance company is unable to get a complete report and full information concerning the accident, it is unable to successfully defend a lawsuit, and because of that fact a judgment might result against them. (R., 95-96.)

Frank Curry testified that he was associated with Walter P. Dolle & Company, of Cincinnati, who are agents of the Globe Indemnity Company of Newark, New Jersey. That that company would not write any insurance for any of the appellants, or any other person in that business, in accordance with the terms of the ordinance; that that type of insurance is classified as "driverless car insurance." That the basic rate of the premium for insuring the owners of that type of car, and the rentee, is two hundred and thirty-two dollars and fifty cents ($232.50) per car, irrespective of the number of cars operated. That another method of figuring the premium is by basing the rate upon earnings, but in no event does the rate go below the basic rate of two hundred and thirty-two dollars and fifty cents ($232.50) per car.

He also testified that he made inquiries of the United States Fidelity and Guaranty Company, and the Trav-

elers Insurance Company, as to writing this type of insurance for appellants or others in that business, but that those companies refused to write this type of insurance.

The witness further testified that the percentage of automobile owners who carry insurance for public liability and property damage in Hamilton county, Ohio, is 24% to 26%. That 74% to 76% of automobile owners are not insured, and that he obtained this information from statistics compiled by the various insurance companies writing automobile casualty insurance in Cincinnati, Ohio. That this type of insurance is considered by the insurance companies to be the greatest risk, as it is difficult for the insurance companies to obtain reports of accidents from the rentees.

That the larger insurance companies are members of what is known as the Casualty and Surety Underwriters Conference, and that no members of that conference will write that type of insurance, and that no companies of any kind, in or out of that conference, of any financial responsibility, with the possible exception of one or two, will write that insurance. That one of the companies that has written that type of insurance is the General Casualty and Surety Company of Detroit, but since the ordinance was passed, that company has turned down that type of business. A few of the larger companies have written this type of insurance some years ago, but have recently abandoned it, as they did not care for that business.

That one company, which is known as a reciprocal

company, by name, the Utilities Indemnity Insurance Company of Kansas City, Missouri, writes this type of insurance.

That "reciprocal companies" are members of the reciprocal exchange, which means assessment companies, under the rules of which its members who are insured may be assessed to make up losses, if they occur. That each insured is a stockholder, and assumes an additional liability, which amounts in effect to the insured being his own insurer.

The witness further testified that his company did write this type of insurance three or four years ago, but has since abandoned it. (R., 42-55.)

On behalf of appellees, the following testimony was offered:

Clifford D. Hoffner testified that he was chief duputy city treasurer. That the Kissel Skiles Company and the Bohannon Rent-A-Car Company, had deposited policies of insurance with him, as required by the ordinance. That the Saunders company had delivered a policy, which had no rider on it as required by the ordinance, and that he therefore returned it. That the Bohannon company's policy was with the Utility and Indemnity Company, and was acceptable to the city treasurer. That policy was offered in evidence in the case. The Kissel Skiles company's policy with the General Casualty and Surety Company was also acceptable to the city treasurer. (R., 81-83.)

Henry S. Davidson testified that he was manager of the Kissel Skiles company; that his company operates

fifty-seven automobiles, and that they carry insurance with the General Casualty Company and have complied with the ordinance. He further testified that the Kissel Skiles company is a national system, operating in six states in the Union. (R., 83-86.)

Ovah Sawyer testified that he was manager of the Saunders Drive-It-Yourself Company, having been associated with that company for two years, and that his company carried insurance with the Employers Indemnity Company of Kansas City. That his company operates thirty automobiles in Cincinnati, and operates in about fifty-six cities in twenty-seven different states. (R., 87-89.)

Charles A. Hinkle testified that he was an insurance agent, representing a number of companies, one of which was the Mercer Casualty Company, of Celina, Ohio, which company will write the type of insurance required by the ordinance. That the rate was nine dollars and ninety cents ($9.90) on each one hundred dollars ($100.00) of gross earnings on each automobile insured, or a basic rate of two hundred and thirty-two dollars and fifty cents ($232.50) per car.

That the Mercer Casualty Company has a paid in capital of one hundred thousand dollars ($100,000.00), with a thirty-one thousand dollar ($31,000.00) reserve. That the company was three years old, and that they are experimenting with this type of insurance.

That while his company was willing to write the insurance, it might be possible that they would be compelled to raise the rates as others are doing, or drop it

altogether, if their experience over a reasonable length of time proves unsatisfactory to them.

That the basic rate of practically ten per cent. (10%) of the gross earnings per car, is subject to change, depending upon the company's experience with this type of insurance.

He further testified that his company had not yet written any of this type of insurance because he had not yet obtained any, but that he was satisfied his company would be willing to write this type of insurance and that he believed that his company would be approved by the city treasurer although he had not submitted to the city treasurer any policies issued by his company. (R., 89-92.)

OUTLINE OF ARGUMENT.

The Ordinance in Question Is Unconstitutional, Being Violative of the Fourteenth Amendment to the United States Constitution, in that Said Ordinance and the Respective Sections Thereof Deprive Appellants of Their Property Without Due Process of Law and Deny to Appellants the Equal Protection of the Laws.

I.

The ordinance attempts to regulate a purely private business not impressed with any public character, and therefore it is not within the police power of the municipality.

II.

The ordinance attempts by legislative fiat to convert property used exclusively in a private business into a public utility and to make the owner thereof a public carrier with its burdens and duties.

III.

The ordinance is not a regulation of the use of the public streets of a municipality, nor is the business of appellants of leasing automobiles to be driven by lessees, a use by the lessor of the public streets for gain.

IV.

The ordinance attempts to impose upon appellants liability without fault, from which they are exempt under the common law.

V.

The ordinance is discriminatory as to appellants and the classification for regulation purposes of the automobiles leased by them is unreasonable and has no reasonable relation to the peace, safety and morals of the public.

VI.

The ordinance is harsh, oppressive, impracticable, and unworkable.

ARGUMENT.

The Ordinance in Question Is Unconstitutional, Being Violative of the Fourteenth Amendment to the United States Constitution, in that Said Ordinance and the Respective Sections Thereof Deprive Appellants of Their Property Without Due Process of Law and Deny to Appellants the Equal Protection of the Laws.

I.

The ordinance attempts to regulate a purely private business not impressed with any public character and therefore it is not within the police power of the municipality.

The principal provisions of Ordinance No. 50-1929 complained of are Sections 65-1b, 65-1e, 65-3, 65-5, 65-7, 65-8, 65-9, 65-11, 65-12, 65-13, 65-42, 65-45, 65-47 and 65-48 (R., 97-103).

To uphold the validity of the ordinance in question under the police power of the municipality and to justify the regulations therein contained, it is necessary that the business of appellants or the service rendered by them come within one of the two following classes:

(A) The business must be one impressed with a public character such as has been recognized from the earliest times and as is exemplified in the following cases:

Munn v. Illinois, 94 U. S., 113, where the charges of grain warehousemen were regulated; followed in Budd v.

New York, 143 U. S., 517, and in Brass v. North Dakota, 153 U. S., 391; Spring Valley Waters Works v. Schottler, 110 U. S., 347, and Van Dyke v. Geary, 244 U. S., 39, where the rates of gas and water companies and similar corporations were regulated; Noble State Bank v. Haskell, 219 U. S., 104, where the banking business was regulated; German Alliance Insurance Company v. Kansas, 233 U. S., 390, and O'Gorman v. Hartford Insurance Company, 282 U. S., 251, where the rates of fire insurance companies and the commissions of insurance agents were involved.

(B) The automobiles used by appellants must be operated as common or public carriers and special or extraordinary use made of the public streets for the purposes of gain, as is exemplified in the cases of Packard v. Banton, 264 U. S., 140; State, ex rel. McBride v. Deckebach, 117 O. S., 227, and numerous other cases representing an almost unbroken line of authorities.

Another ground for upholding laws of this character, but which is not pertinent here, is that of immediate necessity or emergency, as exemplified in the cases of Block v. Hirsch, 256 U. S., 134, and Wilson v. New, 243 U. S., 332.

The foregoing classification justifying the regulation of a business is set forth in the case of Wolff Packing Company v. Court of Industrial Relations, 262 U. S., 522, as follows:

> "Syl. 2. Business said to be clothed with a public interest justifying some public regulation, may be divided into three classes:

(a) Those which are carried on under authority of a public grant of privileges expressly or impliedly imposing the affirmative duty of rendering public service demanded by any member of the public, e. g., the business of a common carrier, or a public utility.

(b) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from the earliest times, has survived the period of arbitrary regulation of all trades and callings by parliament or colonial legislatures, e. g., inns, cabs, and grist mills.

(c) Other business which have come to have such a peculiar relation to the public that government regulation is being superimposed upon them, may where the owner, by devoting his business to the public use, in effect grants the public an interest in that use, and subjects himself to regulation to the extent of such interest."

In that case the court laid down certain rules which apply with equal force in the instant case, as follows:

"Syl. 1. Legislative authority to abridge freedom of contract can be justified only by exceptional circumstances, and the restraint must not be arbitrary or unreasonable.

Syl. 3. A declaration by the legislature that a business has become affected with a public interest is not conclusive of the question whether attempted regulation on that ground is justified.

Syl. 4. In the present day one does not devote one's property or business to public use, or clothe it with a public interest, merely by making commodities for, and selling them to, the public, in the common callings.

Syl. 5. The option to deal or abstain from dealing, usually distinguishes private from quasi-public occupations."

As was said by Mr. Chief Justice Taft, at page 536 of the opinion in that case, when speaking of a business impressed with a public character:

> "In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well-being of the people. The public may suffer from high prices and strikes in trades, but the expression 'clothed with a public interest,' as applied to a business, means more than that the public welfare is affected by continuity and by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of Munn v. Illinois and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public."

(A) It hardly needs any extended argument to show that the nature of appellants' business is not such a one as is impressed with a public character, which makes it subject to police regulations, within the meaning of that term as defined in the case of Munn v. Illinois, supra. The Supreme Court of Ohio, in its decision in this case, apparently recognized that fact as that point is passed by without any comment and the decision makes no mention of it whatsoever.

The nature of appellants' business is no different from that of the old time occupation of livery stable keeper, who keeps teams and carriages to let for hire, as was observed by the trial judge and by the Supreme Court of the state of Washington in the case of State v. Bee Hive Auto Service Company, Inc., 137 Wash., 372. The

same distinction was clearly set forth by Mr. Justice Holmes in the case of The Terminal Taxicab Company v. Public Utilities Commission, 241 U. S., 252, in which opinion, at page 256, he said:

> "It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But however it may have been in the earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail any obligation to sell. It is assumed that an ordinary shopkeeper may refuse his wares arbitrarily to a customer whom he dislikes, and although that construction is not conclusive, German Alliance Insurance Company v. Kansas, 233 U. S., 387, 407, it is assumed that such a calling is not public as the word is used. In the absence of clear language to the contrary it would be assumed that an ordinary livery stable stood on the same footing as a shop, and there seems to be no difference between the plaintiff's service from its garage and that of the livery stable. It follows that the plaintiff is not bound to give information as to its garage rates."

It therefore follows that the ordinance in question cannot be upheld upon the authority of Munn v. Illinois, supra, and the cases following it.

(B) If it could be said that the automobiles used by appellants are being operated as common or public carriers, or that appellants are using the public streets for purposes of gain, which is special and extraordinary, then they would be subject to regulation.

It hardly needs any extended argument to prove that appellants are not common or public carriers. The Su-

preme Court of Ohio, in the instant case, recognized that fact in its opinion, and opposing counsel conceded in the courts below that appellants are not common carriers, claiming only that appellants were using the streets for private gain, which justified the exercise of the police powers of the municipality and the authority to impose the regulatory measures provided for in the ordinances.

The Supreme Court of Ohio, in the case of Motor Freight, Inc. v. Public Utilities Commission, 120 U. S., 1, recognized this rule when it held:

> "Syl. 3. Carriers operating under private contracts for carriage, are not subject to public regulation unless such carriers hold themselves out as willing to serve the public indiscriminately."

See also,

Hissen v. Guran, 112 O. S., 59.

In Allen v. Railroad Commission, 179 Cal., 68 (writ of certiorari denied by this court in 249 U. S., 601), it was held:

> "To constitute a public utility, the devotion to public use must be of such character that the public generally, or that part of it, which has been served, and which has accepted the service, has the right to demand that that service shall be conducted, as long as it is continued, with reasonable efficiency, under reasonable charges. Public use means the use by the public and by every individual member of it, as a legal right."

In State v. Bee Hive Auto Service Company, Inc., supra, it was held:

> "(2) Leasing automobile to be used only by lessee does not make lessor a public or private common carrier of passengers for hire."

At page 385, of the opinion, the court said:

> "It is true, of course, that the lessor, by the act of leasing, enters into certain obligations, so well understood as not to require enumeration here; but we think it manifest that he does not by the act undertake to carry any one and much less does he become by the act, either a public or private carrier of passengers for hire. His situation is no different, in legal effect from that of the old time occupation of livery stable keeper, who keeps teams and carriages to let for hire. No court, in so far as we are aware, has ever held such a keeper to be a common carrier of passengers and we think a like rule must apply to the defendants in this instance."

In State v. Dabney, 176 Ark., 1071, it was held:

> "One renting or hiring to individuals who applied therefor, automobiles, to be operated by the hirer at his own risk and discretion, was neither a private nor public carrier of passengers, and was not engaged in the business of using motor vehicles for transportation of passengers for hire, within the meaning of acts * * * requiring payment of tax in addition to registration fee."

In Jones v. Ferguson, 181 Ark., 522, it was held:

> "Syl. 4. Common carriers are subject to regulation, but a private carrier is not."

In the case of Smallwood v. Jeter, 42 Idaho, 169, it was held:

> "(10) Under presumption that legislature intends to keep within its power, Laws—1925, Ch. 197, providing for auto transportation companies furnishing insurance or bond to satisfy recovery for injury to passenger or damage to property, must be construed as applicable to common carriers only.

(12) The requirement of Laws—1925, Ch. 197, Sec. 3, that auto transportation companies furnish insurance or bond to satisfy recovery for injury to passenger or damage to property **is a regulation under the police power which can only be imposed on a public carrier as distinguished from a private carrier.**" (Heavy type ours.)

The case of Packard v. Banton, supra, which was relied upon by the Supreme Court of Ohio in the instant case, is clearly distinguishable. That case involved the regulation of taxicabs, which this court, at page 144 of the opinion in the Packard case, recognized to be common carriers for hire, and therefore as users of the streets for gain which was special and extraordinary and not such a use as a member of the public in the ordinary way. At page 145 of the opinion in that case, Mr. Justice Sutherland said:

> "Moreover, a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right, and one carried on by government sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition and may justify a degree of regulation not admissable in the former."

Since it is clear that the business of appellants is not impressed with a public character and that their automobiles are not operated as common or public carriers, their business is a purely private one which may be engaged in as a matter of right. Therefore the degree of regulation permitted in Packard v. Banton, supra, is not permissible in the instant case. As was stated by the trial judge with reference to the claim made by the

city that appellants are using the streets for private gain and therefore are subject to regulation as provided for in the ordinance:

> "It must be noted that plaintiffs are not using the public streets—it is their lessees that are using the public streets and they and their lessees are not making any private gain of such use of the streets other than what may be claimed as to others using automobiles on the public streets.
>
> Whether one using an automobile on the public streets owns the same or has rented or borrowed it, is not any test as to whether or not such person is using the public streets for private gain."

(See appendix, page 44.)

II.

The Ordinance Attempts by Legislative Fiat to Convert Property Used Exclusively in a Private Business Into a Public Utility and to Make the Owner Thereof a Public Carrier with Its Burdens and Duties.

Apparently the city council in passing the ordinance recognized the fact that neither the business of appellants nor the automobiles leased by them are subject to regulation unless they come within the category of public or common carriers, and therefore, by legislative fiat, the city council undertook to make them such, for Section 65-1B of the ordinance provides as follows:

> "Public vehicles. The term shall apply to all vehicles furnishing individual service as a business for the transportation of persons, which are hereby classified as (1) public vehicles which seek their business, or a part thereof, on the public streets or quasi-public places, to wit: 'taxicabs,' and (2) public

vehicles which use the public streets for the purpose of transporting passengers for hire, but which do not seek their business thereon, or in quasi-public places, to wit: 'autos-for-hire,' 'driverless autos-for-hire,' and 'funeral cars.'" (R., 97.)

Section 65-1E of the ordinances, provides:

"The term 'driverless auto-for-hire' shall include **any public vehicle** which is rented or hired out to a person other than the owner, and operated by the person renting or hiring the same for his own use and not for the purpose of transporting persons for compensation." (R., 98.)

If the automobiles leased by appellants or the nature of their business do not constitute them public or common carriers, then they cannot be made so by legislative fiat. In Smallwood v. Jeter, supra, it was held:

"(11) State cannot by legislative fiat convert property used exclusively in business of private carrier into a public utility, or make the owner a public carrier."

In Michigan Public Utilities Commission v. Duke, 266 U. S., 570, it was held:

"To convert property used exclusively in the business of a private carrier, into a public utility or to make the owner a public carrier by legislative fiat, is beyond the power of a state since it would be taking property for public use without just compensation in violation of the due process clause of the Fourteenth Amendment."

III.

The Ordinance Is Not a Regulation of the Use of the Public Streets of a Municipality, Nor Is the Business of Appellants of Leasing Automobiles to Be Driven by the Lessees, a Use by the Lessor of the Public Streets for Gain.

The city of Cincinnati has the right to regulate the use of automobiles or carriages kept for hire, and to license and regulate the use of the streets by persons who use vehicles or solicit or transact business thereon (Section 3632, General Code of Ohio.) But does that section of the Code, or the Home Rule Amendment to the Constitution of Ohio (Section 3 of Article XVIII) give the city the power to regulate the business of appellants? Since appellants are not public or common carriers, since they do not solicit or transact business upon the public streets and do not make a special or extraordinary use of the public streets for private gain, it seems that the power given the city by Section 3632, General Code of Ohio, or by the Home Rule Amendment to the Constitution of Ohio, does not include the regulatory measures adopted in the ordinance in question. The power of the city under the Ohio law and constitutional amendment aforesaid, with reference to the regulation of the use of the streets, includes such matters as designating speed of the automobiles, the stopping places, whether a street shall be used one way or two ways, and other similar instances with reference to the use of the streets by

vehicles, in the interest of the peace, safety and morals of the public. It is very obvious, however, that the ordinance in question is in no real sense a regulation of the use of the public highways.

In Frost Trucking Company v. Railroad Commission of California, 271 U. S., 583, in which was involved the validity of an act of California requiring private carriers operating automobiles for hire to obtain a certificate of public convenience and necessity from the state railroad commission before operating over state highways between fixed termini, which this court held to be violative of the due process of the Fourteenth Amendment, Mr. Justice Sutherland, at page 591 of the opinion, said:

> "It is very clear that the act, as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions. **Operation or conservation of the highways is not involved.**" (Heavy type ours.)

A similar observation was made by the Supreme Court of Ohio in the case of Village of Nelsonville v. Ramsey, 113 O. S., 217, where the court held:

> "City ordinance could not prohibit bus traffic on its streets when authorized by Public Utilities Commission when not reasonably necessary for safety of pedestrians upon the street, nor where no congested condition of street requires a detour from the established route in the city."

At page 226 of the opinion Judge Day quotes from the opinion of the judge of the Court of Appeals who wrote the opinion in that case in that court, as follows:

> "The council enacted the ordinance for the protection of the street railway company solely and the things stated in the ordinance as reasons for its enactment, namely, to relieve congested traffic, etc., are not true."

In Michigan Public Utilities Commission v. Duke, supra, in which was involved the validity of a statute of Michigan which imposed upon all persons engaged in the transportation for hire by motor vehicles over state highways, the duties and burdens of a common carrier, which include the giving of bonds of indemnity to secure payments of claims and liability resulting from injury to persons or property and which this court held to be violative of the due process clause of the Fourteenth Amendment, Mr. Justice Butler, at page 577 of the opinion, said:

> "Clearly the requirements (of the city) have no relation to public safety or order in the use of motor vehicles upon the highways, or to the collection of compensation for the use of the highways."

In Jones v. Ferguson, supra, it was held:

> "(5) The act regulating cars for hire using the highways (Acts 1927, C. 99) **does not regulate traffic on the highways, but regulates the business of the persons to whom it applies.** (Heavy type ours.)
>
> (6) A carrier operating a truck between two towns, not holding himself out to the public, but contracting with certain merchants to do their haul-

ing, held: 'A private carrier not subject to regulation.'

(7) Acts 1927, C. 99, regulating cars for hire, has no application to private carriers and is valid."

At page 527 of the opinion, the court quotes from Frost Trucking Co. v. Railroad Commission of California, supra, to the effect that the city does not regulate the use of the highways, but regulates the business of those engaged in using the same.

In Minnesota v. Robinson, 42 Minn., 107, there was involved a municipal ordinance, with reference to regulating persons engaged in the business of using vehicles upon the city streets, and it was held:

"The provision of the charter of the city of Minneapolis authorizing the city council to license and regulate hackmen, draymen, expressmen and all other persons engaged in carrying passengers, packages or freight, and to regulate the charges thereon, applies only to those who are engaged in business as carriers of persons or property for hire and not to those, who not being engaged in such business merely hire out teams and vehicles to those who have property to transport, the hirer himself using and controlling the team and vehicle."

In City of Rockford v. Nolan, 316 Ill., 60, it was held:

"(6) The power to open and improve streets and public ways and to regulate their use * * * **does not include the licensing of an occupational or business.**" (Heavy type ours.)

IV.

The Ordinance Attempts to Impose Upon Appellants Liability Without Fault, From Which They Are Exempt Under the Common Law.

It has long been the rule at common law that no liability can be imposed on one without fault or negligence and also, that a bailor in a contract of bailment for hire who does not retain control of the chattel, is not responsible to a third person for the negligent use by the bailee of a motor vehicle which is let for hire and over which the bailee is given sole custody and control.

In the case of the City of Rockford v. Nolan, supra, the rule as to the bailor and bailee is set forth, and it was held that the city and village act of Illinois did not authorize the enactment of an ordinance changing the rule.

On the subject of the creation of liability without fault or negligence, we cite the following cases:

Ives v. The South Buffalo Railway Company, 201 N. Y., 271 (which involved one of the first workmen's compensation laws); Ziegler v. South and North Alabama Railroad Company, 58 Ala., 594, which held invalid an act fixing absolute liability on a corporation to make compensation for injuries done to property in the prosecution of its lawful business, without any wrong, fault or neglect on its part, when, under the general law, no one else is so

liable under such circumstances. On the same subject we also cite the following cases:

Birmingham Mineral Railroad Company v. Parsons, 11 Ala., 662;
The Ohio and Mississippi Railroad Company v. Lackey, 78 Ill., 55;
Jensen v. Union Pacific Railway Company, 6 Utah, 253;
Bielenberg v. Montana Union Railway Company, 8 Mont., 271;
Schenck v. Union Pacific Railway Company, 5 Wyo., 430.

We submit that to require appellants to pay the large premiums for the insurance policies at the rate of two hundred and thirty-two dollars and fifty cents ($232.50) per automobile, which is about sixteen per cent. (16%) of the gross earnings of appellant's business, as required by Sections 65-7, 65-8 and 65-10 of the ordinance (R., 99-100), is indirectly creating liability without any fault or negligence. The ordinance makes appellants indirectly liable for the negligence of their bailees, and therefore what cannot be done directly should not be permitted to be done indirectly. If the power to create such liability directly or indirectly resides anywhere, it would be in the state legislature and not in the city council, for it would in effect be a general law, and only the legislature of the state of Ohio has the power to pass a law of a general nature. (Section 26 of Article II of the Ohio Constitution.)

V.

The Ordinance Is Discriminatory as to Appellants and the Classification for Regulation Purposes of the Automobiles Leased by Them Is Unreasonable and Has No Reasonable Relation to the Peace, Safety and Morals of the Public.

The strict regulations and requirements of the ordinance in question, especially Sections 65-3, 65-7, 65-11, 65-13, 65-42, 65-45 and 65-47 (R., 98-102) are, as to appellants, discriminatory in a number of respects. The creation of liability without fault heretofore referred to does not apply to other bailors or to other persons. There is no requirement as to insurance policies or bonds, so far as individual automobile owners are concerned, or as to owners of trucks who might hire or lease them out to individuals. An individual might loan an automobile to another person, and even though the lendee might be negligent and injure another person, no liability exists on the part of the lender.

The city council has classified the driverless automobiles (the type of automobiles owned by appellants) as public vehicles, together with taxicabs, automobiles let out for hire with a driver, and funeral cars, all of which transport passengers for hire, and which are clearly public carriers; whereas the driverless automobile is leased or rented to a person who drives it himself, transports no passengers, does not use the public streets for the purpose of transporting persons, and the owners thereof

(appellants) do not seek their business on the public streets or in quasi-public places. A reasonable classification of this type of vehicle alone, without putting it in the class of a common carrier, might possibly be sustained, but the onerous burdens and liabilities of a common or public carrier are placed upon appellants whose business is a purely private one, which is not impressed with any public character, and who are not entitled to the privileges and immunities of public or common carriers.

The fact of the matter is that the ordinance was enacted for the benefit of the taxicab interests in Cincinnati, which also includes the Cincinnati Street Railway Company, and that the reasons given by city council for the enactment of the ordinance are not true, just as the court observed in Frost Trucking Company v. Railroad Commission of California, supra, and in Village of Nelsonville v. Ramsey, supra.

VI.

The Ordinance Is Harsh, Oppressive, Impracticable and Unworkable.

Sections 65-7 and 65-11 of the ordinances of the city of Cincinnati which require the furnishing of liability insurance policies or bonds in lieu thereof, are arbitrary, unreasonable, oppressive, impracticable and unworkable. The premiums demanded for the insurance (if insurance could be obtained, which cannot be done) is based upon the basic rate of two hundred and thirty-two dollars and

fifty cents ($232.50) per automobile, which is about sixteen per cent. (16%) of the gross earnings of appellants' business, as the testimony shows that each automobile of appellants averages approximately sixteen hundred dollars ($1600.00) per year in gross earnings (R., 73).

It is utterly impossible to obtain a surety bond (R., 70) and it is obvious that no private surety could be obtained. The testimony is uncontradicted that there are but two or three insurance companies that have written this type of insurance, none of the large companies writing any of it, that one of those companies has already abandoned it and one is merely experimenting with it (R., 93-94).

While we realize that the inability of a party to comply with a law without assuming an excessive burden does not render the requirement unconstitutional, if due to his peculiar circumstances (Packard v. Banton, supra); nevertheless in the instant case it appears that the appellants represent the majority of the drive-it-yourself companies in this city, who are unable to obtain this insurance at any price; and that only a limited number have been able to obtain the insurance because of circumstances peculiar to them, namely, that they are national organizations, with branch offices in various cities, and as to them one or two companies are willing to experiment. If this type of business is extra-hazardous to the public, as has been argued, then no insurance company will, after a reasonable experiment, insure this type of business. The protection, therefore, intended for the public is more illusory than real. There is no more reason to require the lessee of this type of automobile

to be insured than the individual automobile owner, and the hazard of the rented automobile is no greater than the hazard of the individual automobile owner, and it is certainly much less than the hazard arising from the indiscriminate sale of used automobiles by used car dealers, which are usually sold with down payments of five or ten dollars in cash and which automobiles are not only mechanically defective and not fit for use, but are generally sold to persons without financial or moral responsibility and very often to the criminal element.

There is no merit in the contention that the general public has no adequate remedy for personal injuries or property damage sustained, due to the negligent operation of rented automobiles by the driver, or as the result of the indiscriminate and negligent renting of the car by the owner.

If the renter of the car is negligent, the person injured has a remedy under the common law against the driver of the car causing the injuries, which remedy is as adequate under the present law as the remedy given to one injured through the negligence of a person driving his own automobile. If the owner of the car is negligent because of indiscriminate renting of the car to inexperienced or incompetent persons, or in knowingly renting an automobile which is mechanically defective and likely to cause injury, the injured person has a complete and adequate remedy against the owner of the car. (Elliott v. Harding, 107 O. S., 501, and many other similar cases.)

Sec. 65-2 requires a license fee of $8.00 for each vehicle operated by appellants in addition to the state license fee of $4.00 to $6.00 per vehicle.

Sec. 65-7, 65-8, and 65-10 require the insurance policies and Sec. 65-11 requires a bond in lieu of insurance.

Section 65-13 of the ordinances of the city of Cincinnati is discriminatory in that it requires unnecessary information having no reasonable relation to the public welfare, and not required of other automobile owners.

Section 65-42 of the ordinances vests legislative power in the director of public utilities of the city.

Sections 65-45 and 65-47 of the ordinances provide severe penalties for any infraction of the ordinance, the result of which would completely destroy appellants' business.

Section 45-48 vests final judicial authority in the city manager, without any resort to the courts, in effect ousting the courts of their jurisdiction.

SUMMARY OF AUTHORITIES.

The authorities upon the precise questions involved in this case are few in number, but we submit that the greater number are against the validity of the ordinance in question. The case of City of San Antonio v. Besteiro, 209 S. W., 472 (Tex. Civ. Ct. of Appeals) relied on by the Supreme Court of Ohio in this case, held that this type of business is subject to some regulation, but it did not pass upon the important points raised in that case, and involved in the instant case, for the reason that they were not properly brought into the record. That case was decided in 1919.

In 1928 the same court decided the case of Genuso v. City of Houston, 10 S. W. (2nd), 772. In that case the

same court reaffirmed the doctrine laid down in the Besteiro case, that the driverless automobile was subject to some regulation, but held that the insurance and bond provisions of the ordinance were invalid. The court in that case held:

> (5) "Ordinance of city of Houston, Section 194, requiring owners of driverless autos, before engaging in business of renting such automobiles, to furnish bond (or insurance policies) for benefit of persons injured by drivers of vehicles, regardless of whether driver be servant or agent of owner, imposes on owner liability from which he is exempt under the common law, and it is therefore inconsistent with Const. Art. II, Sec. 5, known as the Home Rule Amendment, and general law (Rev. St., 1925), Art. 1, putting common law of England in force, and ordinance is therefore void."

In the case of City of Rockford v. Nolan, supra, a somewhat similar ordinance was held to be invalid. In that case the court held:

> (9) "The rule that a bailor in a contract of bailment for hire, who does not retain control of the chattel, is not responsible to a third person for his negligent use by the bailee, applies where a motor vehicle is let for hire, and the bailee is given sole custody and control of the car, and the city and villages act does not authorize the enactment of an ordinance changing the rule."

Other cases involving the regulation and licensing of driverless automobiles and ordinances attempting to impose the onerous burdens and duties of common carriers, and all of which were held invalid, are:

State v. Bee Hive Auto Service Co., Inc., supra;
State v. Dabney, supra;
Jones v. Ferguson, supra; and
Minnesota v. Robinson, supra.

The only case cited by opposing counsel or by the Supreme Court of Ohio in its opinion, directly in point, and which upholds the validity of similar legislation, is that of Welch v. Hartnett, 215 N. Y. S., 541, which was a decision by a nisi prisi court of New York. That case is distinguishable in that it involved a state statute. Assuming for the sake of argument that the opinion in that case is sound, which we question very much, yet it involved a state statute or a general law. While the power of a municipality, within its jurisdiction, is as great as that of the state within its jurisdiction, where the field has not been pre-empted, nevertheless we maintain that the municipality has no power to regulate this type of business in the manner the city council has seen fit to do. It is only for the state legislature and not for the city council, for a state statute is a law of a general nature affecting all persons of the same class in the state equally and not discriminating between any of them; whereas, the ordinance discriminates as against residents of Cincinnati, in said state, but does not affect residents in any of the other cities in said state. Under the Ohio Constitution (Section 26, of Article II) "all laws of a general nature shall have a uniform operation through the state • • •"

We therefore respectfully submit that on the authority of the decided cases directly in point, the ordinance in question should be held invalid as violative of the Fourteenth Amendment to the Constitution of the United States. We further submit that the case of Packard v. Banton, supra, and the case of State, ex rel. McBride v.

Deckebach, upon which the Supreme Court of Ohio so much relied are limited in their application to public or common carriers and that therefore they are entirely distinguishable from the present situation. That the business of leasing automobiles, as appellants do, is not such a business as is impressed with a public interest, within the meaning of Munn v. Illinois, supra. That the designation of the type of vehicles used by appellants by the city council as "public vehicles," which attempts to make appellants public or common carriers by legislative fiat, is beyond the power of the municipality or any other legislative body; that even if the ordinance could otherwise be upheld in its present form, it is clearly impracticable and unworkable.

CONCLUSION.

We respectfully submit that said Ordinance No. 50-1929 of the ordinances of the city of Cincinnati, and especially Sections 65-1B, 65-1E, 65-3, 65-7, 65-8, 65-9, 65-10, 65-11, 65-13, 65-42, 65-45, 65-47 and 65-48, are unconstitutional, invalid and void for the following reasons:

(1) Said ordinance, and the respective sections thereof aforesaid, have no reasonable relation to the public health, safety and morals; are therefore not within the police power of the municipality, and are in contravention of the Fourteenth Amendment to the Constitution of the United States, in that appellants are deprived of their property without due process of law, and are denied the equal protection of the laws. That the automobiles owned by appellants, and the nature of appellants'

business, is not such as would justify the regulation attempted by the ordinance, their business not being impressed with a public interest, their automobiles not being used as common or public carriers, their business not being conducted upon the streets or in quasi-public places, they are not using the public streets for gain and are not making any unusual or extraordinary use of the public streets.

(2) Said ordinance, and the respective sections thereof, as aforesaid, are unreasonable, unduly oppressive, are an unjustifiable interference with a purely private business and are impracticable and unworkable.

We further respectfully submit that said ordinance and the respective sections thereof as aforesaid, should be declared to be unconstitutional and void as to appellants, and that the city of Cincinnati, and its respective officers, the appellees in this case, should be perpetually enjoined from enforcing those provisions of the said ordinance.

JULIUS R. SAMUELS,
Counsel for Appellants.

APPENDIX.

Opinion of Common Pleas Court.

Struble, J.:

The plaintiff companies are engaged in the city of Cincinnati, in the business of hiring out or leasing automobiles to persons who drive them themselves. The business these concerns are engaged in is a modernization of the livery business only they hire out automobiles instead of horses and buggies, and feed gasoline and oil instead of corn and oats.

The plaintiffs have obtained from the state of Ohio the usual motor vehicle license for each of their automobiles. But the city of Cincinnati has entered the field and by classifying plaintiffs' automobiles as "public vehicles" is requiring a city license for such automobiles, and as a condition to the issuance of the same, liability insurance, or a bond in lieu thereof.

On February 6, 1929, the city council of Cincinnati passed an ordinance No. 50-1929, effective March 9, 1929, regulatory of "public vehicles and public vehicle drivers," wherein it classified plaintiffs' automobiles as public vehicles requiring a city license for each automobile, the license fee to be $8.00 per year for each automobile.

Application for such license must be made to utility director (Section 65-3) upon blanks to be furnished by the director, and wherein there is to be set forth certain information required by the director.

The ordinance is a penal ordinance, and by the terms of the ordinance automobiles are not to be used in this character of business without a license.

By Sections 65-6 and 65-7 no license is to be issued, or renewed, nor any such automobile operated on the public streets unless and until there has been deposited with the city treasurer a policy of insurance which meets his approval, or in lieu thereof a bond.

This insurance or bond, within certain limitations, is to indemnify judgment creditors as against "any person other than employees of the insured, and resulting from negligent operation, maintenance or use of such licensed public vehicles."

Public vehicles are defined in Division D, Section 65-1b, as follows:

> "The term 'public vehicles' shall apply to all vehicles furnishing individual service as a business in the transportation of persons, which are hereby classified as (1) public vehicles which seek their business, or a part thereof, on the public streets or quasi-public places, to wit: 'taxicabs,' and (2) public vehicles which use the public streets for the purpose of transporting passengers for hire, but which do not seek their business thereon, or in quasi-public places, to wit: 'autosforhire,' 'driverless autosforhire' and 'funeral cars.'"

The classification here is sufficiently broad enough to include all public and private carriers, but the ordinance specifically exempts street cars, motor buses and omnibuses. The classification remaining includes taxicabs, funeral cars, autosforhire, and driverless autosforhire.

Counsel for the plaintiffs objects to the classification

of plaintiffs' automobiles as public vehicles, and makes the claim that plaintiffs' business is not a public business and that plaintiffs are not public or private carriers.

The ordinance defines the term "driverless autoforhire" as "any public vehicle which is rented or hired out to a person other than the owner, and operated by the person renting or hiring the same for his own use and not for the purpose of transporting persons for compensation." (Section 65-1e.)

The ordinance provides further, Section 65-1f, and "autoforhire shall include any public vehicle other than funeral car and driverless autoforhire that does not seek its business on the public streets, or in quasi-public places, and which is driven and in charge of the owner or his employee. Public vehicles used for livery purposes are autosforhire."

The ordinance gives a different definition for driverless autosforhire and autosforhire.

The cause before the court relates merely to "driverless autosforhire." This relates to automobiles that are hired out or leased to persons who drive them themselves.

The essential inquiry is as to whether or not plaintiffs' automobiles are properly classified as public vehicles, which in legal effect is classifying them as either public or private carriers, which is the business of transporting persons over the public streets for hire.

The designation "public vehicles" in any proper sense can only be applied to a vehicle used by a public or private carrier of passengers or freight for hire.

Counsel for the city concedes that the plaintiff companies are not common carriers, but claims that such concerns are using the city streets for private gain, and that the city on this ground in the exercise of its police

powers has the right to impose the regulatory measures provided for in the ordinance.

As to this claim of counsel for the city, it must be noted that plaintiffs are not using the public streets,—it is their lessees that are using the public streets; and they and their lessees are not making any private gain of such use of the streets otherwise than what may be claimed as to others using automobiles on the public streets.

Whether one using an automobile on the public streets owns the same, or has rented or borrowed it, is not any test as to whether or not such a person is using the public streets for private gain.

However this may be, it is not the basis or the ground of the regulatory measures set forth in the ordinance. The regulatory measures in this ordinance are based upon the theory that plaintiffs' automobiles are public vehicles, and that they are conducting their business upon the public streets. If this were so the city would not only have the right to regulate their use of the public streets, but would have the power to bar them from the use of the public streets.

The language of Sections 65-3 and 65-4 clearly indicates that the city council acted upon the theory that plaintiffs were public or private carriers of passengers for hire, and that city council had not only the power of reasonably regulating their use of the streets, but could bar them entirely from the use of the public streets.

The court recognizes that the city council in the exercise of its police power has broad powers of classification and probably could make a classification of businesses of this character and reasonably regulate them as a class. But this question is not before the court. City council has not done that.

Council has classified them as public vehicles, and the regulatory measures provided by the ordinance are based

upon the sole ground that these automobiles are public vehicles.

The evidence in this case shows conclusively that plaintiffs' automobiles are private automobiles, and that plaintiff companies are engaged in a private business.

In the case of State v Bee Hive Auto Service Company, 242 Pac., 384, decided by the Supreme Court of Washington in 1926, it was said:

> "(2) Leasing automobile to be used only by lessee does not make lessor a public or private common carrier of passengers for hire."
>
> "It is true, of course, that the lessor, by the act of leasing, enters into certain obligations, so well understood as not to require enumeration here; but we think it manifest that he does not by the act undertake to carry any one and much less does he become by the act, either a public or private carrier of passengers for hire. His situation is no different, in legal effect, from that of the old time occupation of livery stable keeper, who keeps teams and carriages to let for hire. No court, in so far as we are aware, has ever held such a keeper to be a common carrier of passengers and we think a like rule must apply to the defendants in this instance."

In the judgment of this court plaintiffs are engaged in a private business, and in the language of the court in State v. Bee Hive Auto Service Company, supra, a business "no different, in legal effect, from that of the old time occupation of livery stable keeper, who keeps teams and carriages to let for hire."

As a matter of fact plaintiffs' automobiles are not public vehicles, and the legislative fiat of the city council can not make them what they are not.

The ordinance of the city so classifying them, and regulating them, is inoperative as to plaintiffs.

A decree may be taken accordingly.